

United States of America
Before the National Labor Relations Board

MARYWOOD UNIVERSITY,

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Case 04-RC-173160

Employer

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v.

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MARYWOOD UNIVERSITY
FACULTY ASSOCIATION a/w
PENNSYLVANIA STATE
EDUCATION ASSOCIATION

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:

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Petitioner

**MARYWOOD UNIVERSITY'S STATEMENT IN OPPOSITION TO PETITIONER'S
REQUEST FOR REVIEW**

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On July 31, 2016¹, Petitioner filed a request for partial review of the Regional Director's well-reasoned, fact-based Decision and Order issued on May 11, 2016, seeking to have the Board overturn the Regional Director's finding that the petitioned for unit is composed solely of managerial employees exempt from the jurisdiction of the Board.

Under Board regulation 102.67(d), the party seeking review must demonstrate that compelling reasons exist for review. 29 C.F.R. 102.67(d) states that there are limited grounds upon which review may be granted. Specifically they are (1) that a substantial question of law or policy is raised because of the absence of or departure from officially reportable precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially effects the rights of a party; (3) that the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or (4) that there are compelling reasons for reconsideration of an important Board rule or policy. The Petitioner has failed to articulate a single reason which meets the burden established by 29 C.F.R. §102.67(d).

The Petitioners' claims are without merit. The May 11, 2016, Decision and Order appropriately cites established Board precedent and is consistent and complies with Board case law, specifically the Yeshiva decision and its progeny. NLRB v. Yeshiva University, 444 U.S. 672 (1980), Lewis and Clark College 300 NLRB 155, (1990), Elmira College, 309 NLRB 842 (1992), Livingstone College, 286 NLRB 1308 (1987). The Regional Director properly applied the Yeshiva standards as further articulated by the Board's most recent decision in Pacific Lutheran University, 361 NLRB 157 (2014)

¹It is worth noting that the Petitioner did not file a table of contents and table authorities with the Petition for Review, as required by 29 CFR 102.67(i)(1). Because Petitioner failed to include the mandatory table of contents and table of authorities, the Petitioner's Petition for Review was not filed within the statutorily required time limits and must be dismissed.

("PLU"). In fact the Petitioner does not dispute that the Regional Director appropriately applied the PLU standards, but instead has asserted that the Regional Director's decision regarding the PLU factors should be reviewed "because the approach taken by the Regional Director, picking and choosing among the evidence of faculty authority over the five key areas identified in *Pacific Lutheran* without giving that evidence appropriate weight, opens the gate to the unstructured 'rough-and-tumble of factors' on which *Yeshiva* launched the Board and higher education." Petitioner's Petition for Review pg 3. Essentially, Petitioner is asking the Board to Review the May 11, 2016 Decision and Order because Petitioner does not like the Regional Director's decision to dismiss the Petition. Specifically, Petitioner subjectively feels the Regional Director did not give enough weight to the evidence Petitioner thought was most important, and that the Regional Director did not interpret the evidence presented in a manner favorable to the Petitioner. This is not a sufficient basis for review under the standard established by 29 C.F.R. § 102.67(d).

In Carroll College, 19-RC-165133 (Decision and Order dated January 19, 2016), Regional Director Hooks addressed and rejected the exact issue the Petitioner is raising in the present case. In Carroll College, Regional Director Hooks stated "Although the Board in *PLU* establishes the primary and secondary weight distributed to the decision-making areas discussed in the decision, the decision does not provide clarity as to which types or numbers of factors a party must prove in order to meet its burden." Regional Director Hooks went on to hold that the petitioned for faculty were managerial employees because the evidence established that they played a role in one of the primary areas and both of the secondary areas established by PLU. When the faculty association from Carroll College filed a petition for review with the Board, the Board denied the petition stating the petition for review was

denied “as they raise no substantial issues warranting review.” Carroll College, 19-RC-165133, (Order dated May 25, 2016).

While the facts in Carroll College are not identical to the present case, the issues raised by the Petitioner in both cases is the same; namely what weight should be given to which of the PLU factors and how many primary versus secondary factors have to weigh in favor of the moving party to determine managerial status. The Regional Director performed this exact analysis and found that based upon established Board precedent, Marywood University faculty are managerial employees. The Regional Director analyzed the facts based on the PLU factors and held that because Marywood University faculty have extensive control over academic programs, and a meaningful role in enrollment management and personnel policy and decisions, Marywood University faculty are managerial employees. May 11, 2016 Decision and Order pg 19. As in Carroll College, where the Board denied the petition for review, the Regional Director’s decision is based upon a weighing of the primary and secondary PLU factors to determine managerial status. Since the Board denied the petition for review filed in Carroll College, there can be no finding, as the Petitioner suggests, that the Regional Director’s May 11, 2016 Decision and Order will “open the gate to the unstructured ‘rough-and-tumble of factors’ on which *Yeshiva* launched the Board and higher education.” Accordingly, Petitioner’s Request for Review should be denied as there is no basis for review under 29 C.F.R. § 102.67(d).

Petitioner’s request for review, which is solely based on 29 C.F.R. § 102.67(d)(1), attempts to assert a substantial question of law or policy based on an alleged departure from officially reportable precedent. The basis for this assertion is that the Regional Director did not find that the petitioned for Marywood University faculty had complete control over all five PLU factors. However, as the Regional Director pointed out, this was never a requirement under Board precedent. Moreover, PLU does not change prior Board precedent, but provides a structure for how to analyze cases going forward. May

11, 2016 Decision and Order pg 19, citing Lewis and Clark College 300 NLRB 155, (1990), Elmira College, 309 NLRB 842 (1992), Livingstone College, 286 NLRB 1308 (1987).

Furthermore, the Regional Director's Decision and Order was well reasoned and founded in fact. The Petitioner's request for review mischaracterizes the facts and ignores the extensive evidence presented over four (4) days of hearing that supports the denial of jurisdiction over Marywood. The May 11, 2016, Decision and Order shows that the Regional Director carefully considered the evidence and concluded that the Board cannot properly assert jurisdiction over Marywood. Contrary to the Petitioner's contentions, the evidence conclusively establishes that Marywood University faculty have significant input into the product to be produced by the University and on what terms and from whom. This input comes in the form of effectively making recommendations that are nearly always adopted by the Administration. The Petitioner takes issue with the fact that faculty do not have complete and absolute control over all areas of operation of Marywood University, however, as the Regional Director correctly noted, the Board has never required total faculty control as a prerequisite to finding managerial status and that control over some aspects of a school's operation are sufficient.

The delegation of powers to the Regional Director is designed "to speed the work of the board." Magnesium Casting Co. V. NLRB, 401 US 137, 140 (1970)(Magnesium Casting II). A regional director's decision should be sustained and review denied if it is supported by substantial evidence. NLRB v. Magnesium Casting Co, 427 F.2d 114, 117(1st Cir 1970)(Magnesium Casting I). Substantial evidence means "the amount of evidence constituting enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn is one of fact for the jury." Kay v. FCC, 396 F.3d 1184, 1188 (D.C. Circ. 2005).

Petitioner's objection to the Regional Director's May 11, 2016 Decision and Order is essentially a matter of discontent with the outcome. Petitioner does not agree with the Regional Director's decision

to decline jurisdiction over Marywood University. However, the Petitioner's mere dissatisfaction with the decision does not present grounds for granting a request for review, particularly when the decision is supported by an extensive factual record. Having the Board re-decide cases already decided by the regional directors and supported by substantial evidence would defeat the purpose of the delegation of power.

Accordingly, as the Petitioner has failed to articulate compelling reasons for the Board to reconsider the Regional Director's rational and well-reasoned May 11, 2016, Decision and Order, the Board should deny the request for review. There are no cognizable grounds for granting the request for review or allowing the Petitioner to waste the resources of Marywood University on further legal challenges.

Respectfully Submitted
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	:	
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CERTIFICATE OF SERVICE

I, Lars H. Anderson, Esquire, hereby certify that a copy of the Employer's, Marywood University, Petition for Review was served upon the attorney for the Petitioner via electronic mail at the address below. Service was made upon the following:

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